Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976.

No. 76-699

THE AMERICAN PARTY OF IDAHO,
JOHN McADAMS,
individually and as chairman of
THE AMERICAN PARTY of Idaho, Appellants,

— vs. —

CECIL ANDRUS, Chairman of the
State Board of Examiners, and the
Idaho State Board of Examiners;
DENNISON C. AMBROSS, Director of the
Corporation Department of Revenue and
Taxation; JOE R. WILLIAMS, Idaho
State Auditor; PETE CENARRUSA,
Secretary of the State of Idaho;
and MARJORIE MOON, Treasurer of
the State of Idaho, Appellees.

IDAHO STATE DEMOCRATIC PARTY, Intervenor

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Idaho entered on August 19, 1976, granting summary judgment against Appellants in their attack upon the constitutionality of the state campaign financing act for failure to state a claim upon which relief could be granted. Appellants submit this Statement to demonstrate that the Supreme Court of the United States has jurisdiction of the Appeal and that substantial questions are presented.

OPINION BELOW

There is no reported opinion of the District Court for the District of Idaho. A copy of the Order and Judgment of the District Court granting Defendants' motion for summary judgment is attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U.S.C. section 1343 (3) and (4) to secure the redress for the deprivation under color of State law of a right, privilege or immunity guaranteed by the United States Constitution or by act of Congress and to obtain equitable protection of the civil rights of the Appellants. The Appellants claim a deprivation of rights guaranteed by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. section 1983. A three-judge district court was requested and properly convened in this action under 28 U.S.C. sections 2281 and 2284. The judgment of the District Court for the District of Idaho was entered on August 19, 1976, and timely notice of appeal was filed on November 16, 1976 in that court. The jurisdiction of

the Supreme Court to review this decision is conferred by Title 28, United States Code, section 1253. The following cases sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *MTM, Inc. v. Baxley, 95 S. Ct. 1278 (1975); Roe v. Wade, 410 U.S. 113 (1973); and Lynch v. Household Finance Co., 405 U.S. 538 (1972).*

STATUTES INVOLVED

Sections 34-2501 et seq. of the Idaho Code, and in particular, section 34-2503(b) are set out verbatim in Appendix B. Also set out is Idaho Code section 34-501.

QUESTIONS PRESENTED

Is a system of state campaign financing which distributes funds to political parties based upon the performance of a party's candidate in the gubenatorial election next preceding the distribution of the funds an arbitrary denial of the fundamental right to an equal opportunity to participate in the electoral process as guaranteed by the Fourteenth Amendment to the United States Constitution?

Is a system of state campaign financing which conditions eligibility for funds upon a political party's participation and performance in the gubenatorial election next preceding the distribution of the funds a denial of fundamental rights to equality and an invidious classification contrary to the Fourteenth Amendment of the United States Constitution?

STATEMENT OF THE CASE

On March 26, 1975, the Governor of Idaho signed into law House Bill No. 260 which became effective July 1, 1975. The bill, subsequently codified as Idaho Code sections 34-2501 et seq. (see Appendix B), provided for a system by which the taxpayers of Idaho would assume a portion of the campaign and election expenses of political parties in this State by direct subsidies to those parties. The system created provided funds to political parties through a $1 tax liability "check-off" which could be exercised by an Idaho income taxpayer, earmarking that dollar of his tax monies for the campaign fund. The dollar could be directed to either of four funds: a Democratic party fund; a Republican party fund; a fund for other political parties as indicated by the taxpayer by writing in the name of that party; and an "undesignated" fund. Under the procedure provided by the act, ninety per cent (90%) of the "undesignated" fund is distributed to political parties in Idaho which fielded a candidate for the office of governor in the general election preceding the distribution of the fund (see Idaho Code section 34-2503 (b) in Appendix B). The distribution for the fund in the statute dictates that money be disbursed to parties in the same proportion to the votes that each recipient party's candidate received for the office of governor in relation to the total votes case in the election next preceding the distribution of the monies, provided that no one party receive more than fifty per cent (50%) of the fund.

The Appellants are the American Party of Idaho and its duly elected chairman, John McAdams. The Party is an affiliation of electors representing a political group and is properly created and qualified to participate in the electoral process in Idaho. Mr. McAdams is a member in good standing of the Party and is an Idaho resident.

On July 27, 1976, the Appellants filed this action in the United States District Court for the District of Idaho in Boise asking for an injunction against any distribution of the so-called "undesignated" funds and for a declaratory judgment striking down the distribution formula and eligibility requirements of the state campaign financing act as in violation of the United States Constitution. The named Defendants in the suit were those state officers and administrators charged under the law to execute and supervise the distribution of funds under the state campaign financing program.

On August 1, 1976, the Attorney-General of Idaho, counsel for the Defendants, moved the court for a summary judgment and dismissal of the action. The Democratic Party of Idaho was also allowed to intervene. A three-judge statutory district court was convened and the issues briefed and argued on the 19th of August. At the conclusion of that hearing, the court granted the Defendants' Motion for Summary Judgment and issued its Order in that regard (see Appendix A). It is from this judgment that the Appellants appeal.

THE QUESTIONS ARE SUBSTANTIAL

It can hardly be doubted that a free and open electoral process is the very foundation of a meaningful democratic society. Competitive and substantially unregulated elections serve to protect the ideas of those who, though a minority in number, seek to compete in the marketplace of political and social philosophies. Because of this, it is obvious that any governmental intrusion into this process must be examined with the utmost care to guard the integrity of the system. See *Kramer v. Union Free School District, 395 U.S. 621 (1969); Harper v. Virginia Board of*

Elections, 383 U.S. 663 (1966). Although the State enjoys some right to intervene with reasonable regulations of the nature and operation of elections, *Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23 (1968),* any intrusion must withstand the tests of the United States Constitution to be upheld. The Fourteenth Amendment restriction against invidious classifications clearly applies to protections of voting rights and political organizations. *Carrington v. Rash, 380 U.S. 89 (1965).*

Therefore, any examination of the Idaho system of campaign and election financing must be conducted with an alert eye toward possible constitutional infirmities. The political organizations most likely to be adversely affected by over-regulation of the electoral process are those parties small in number and subject to significant institutional disadvantages apart from any regulations. Consequently, any attempt by the government to "aid" in financing elections, must be especially tailored not to aggravate the natural imbalances of our majoritarian system.

I.

SECTION 34-2503(b) MUST BE TESTED BY THE "STRICT SCRUTINY" EQUAL PROTECTION STANDARD.

The classifications made by the State of Idaho in enacting this particular scheme of campaign financing must be subjected to the strict judicial scrutiny which comes into play when the government seeks to regulate fundamental rights. Although Appellants have advanced their arguments in Equal Protection terms, there are conspicuous overtones of the First Amendment in these challenges. The right of free political association is at the heart of the Appellants' Fourteenth Amendment charges and hence the stricter standard of review is appropriate. *Police Dept. of Chicago*

v. Mosley, 408 U.S. 92 (1972); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

In the area of campaign financing the necessity of the higher standard of equality in measuring allowable state intervention is especially apparent. A lower Federal court aptly recognized this principle while speaking of an area of much similarity to government campaign financing when it said that "the courts have traditionally scrutinized carefully state schemes for regulating access to the ballot, and have not hesitated to strike down a scheme when it placed unreasonable obstacles in the way of candidates or parties." *Buckley v. Valeo, 519 F.2d 821, 880 (1975).* Although strictly speaking the Idaho financing scheme is not restricting "ballot access" as such, it does vitally affect the equally meaningful political interest of campaign effectiveness. It is axiomatic that in today's society in America that adequate campaign financing is essential for any degree of political effectiveness. The power to control campaign financing is in a very real sense the power to control political success.

This Court has recognized the grave personal First Amendment interests involved in government campaign funding, requiring more than mere rationality to pass constitutional muster:

> In several situations concerning the electoral process, the principle has been developed that restrictions on access to the electoral process must survive exacting scrutiny. The restriction can be sustained only if it furthers a 'vital' governmental interest, *American Party of Texas v. White, 415 U.S. 767, 780-81 . . . (1974),* that is 'achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidates' equally important interest in the continued availability of political opportunity.' *Lubin v. Panish, 415 U.S. 709, 716, . . . (1974). See American Party of Texas v. White, supra, 415 U.S. at 780 . . .; Storer v. Brown, 415 U.S. 724, 729-30 . . . (1974). Buckley v. Valeo, 96 S.Ct. 612, 670 (1976) (parallel citations omitted).*

The reason for applying the strict scrutiny standard here is based not only on likely deprivation of the fundamental rights of the candidates and political parties arbitrarily deprived from funding, but also as a means of protecting closely related First Amendment rights of the **voters.** The reapportionment cases, *Reynolds v. Sims, 377 U.S. 368 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); and Gray v. Sanders, 372 U.S. 368 (1963,* unmistakably determined that the right to vote includes not merely the ability to cast a ballot, but also a citizen's right to an equally effective voice in the electoral system:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of a representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. *Reynolds v. Sims, supra, at 555.*

As the Court has noted, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that effect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter, 405 U.S. 134, 143 (1971).* This judicial attitude has been echoed in recent years in a broad range of cases dealing with the close inter-relationship of equal and effective access by candidates and political parties to the electoral process with the voting rights of their supporters:

> The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. *Lubin v. Panish, 415 U.S. 709, 716 (1974).*

It is therefore clear that burdens placed by the State upon candidates and political parties by discriminatory funding of campaigns implicate the constitutional rights of both the disfavored candidates and their supporters. The quotations

above indicate the Court's emphasis of the intricacy of the rights involved in issues such as are presented here, and the extreme delicacy with which the State must proceed in this area.

The Appellants would have this Corut merely recognize the obvious realities of the political process in our society today. Although the concept of state financed campaigns has attractive advantages, any scheme to implement such a program is prone to upsetting the vital state of equilibrium of opportunity for political participation. When examining such funding systems, it must be paramount that basic First Amendment rights of political expression are involved. These are not limited to those of the candidates or political parties in any manner. Consequently, when a state excludes some citizens, be they candidates or their supporters, from having the same opportunity to participate effectively in the electoral process that it grants to others, the standard for reviewing the classifications involved must be "whether the exclusions are **necessary** to promote a **compelling state interest**." *Dunn v. Blumstein, 405 U.S. 330, 337 (1972).* Under such a standard, "a heavy burden of justification is on the State, and the statute will be closely scrutinized in light of its asserted purposes." *Id. at 343.* As will be seen, the Idaho statutes fail to meet this high standard of fairness.

II.
SECTION 34-2503(b) UNCONSTITUTIONALLY FOSTERS AND PROMOTES INCUMBENCY AND INVIDIOUSLY CLASSIFIES POLITICAL PARTIES.

At least one constitutionally repugnant feature of the Idaho campaign financing system, and of Idaho Code section 34-2503(b) in particular, is the formula it utilizes in the distribution of the tax "check-off" dollars for which the taxpayer has not indicated a specific political party recipient. In Idaho, as in many western rural states, voters are not tied to party alliances nearly so strongly as in other

parts of the nation. As a consequence of this extreme voter independence of thought, the "No Specific Party" designation on the tax return is a popular and attractive method of contributing funds to the political campaign process without attaching voter support to any individual faction or philosophy. Hence, to many, the "undesignated" funds under the Idaho system represent the vehicle through which **all** legitimate political groups in the State might have a competitive and realistic opportunity to capture the voting support of the populace. However, the system of funding as presently constituted falls far short of realization of this opportunity, or of the protection of the constitutional rights of minor parties and the taxpayers who check the "undesignated" box on their return. Instead, the established and incumbent parties are given an unconstitutional "lion's share" of the undesignated funds.

Thought it hardly needs repeating, Mr. Chief Justice Warren once described the theme which the Appellants seek to have enforced in this action:

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumberable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society. *Sweezy v. New Hampshire, 354 U.S. 234, 250-51(1957).*

Placing the major parties in such a position of perpetual dominance would clearly be undesirable, but the Idaho system does exactly that. By dividing 90% of the undesignated funds in proportion to the votes received by a party's candidate in the last election for governor, the State has ensured the incumbent party funds which may in a very real sense be far out of line with any demonstrable measure of support it might enjoy. In the words of Mr. Justice

Rehnquist in a recent decision by this Court, the Idaho system has "enshrined the Republican and Democratic party in a permanently preferred position, and has established requirements for funding to which the two major parties are not subject." *Buckley v. Valeo, supra at 761.*

Instead of achieving the admittedly valid governmental purposes of promoting an "influence-free" campaign to the voting public, the Idaho system places new, but strongly supported political parties squarely in the middle of an irresolvable dilemma. On the one hand, although the State is attempting to "aid" legitimate political interests in their efforts to expose their ideas to the public, the new party is offered only what is comparatively a meager amount of funding, determined by an indicator having no rational relation to current levels of popular endorsement. On the other hand, the under-financed new party is forced to compete with incumbent parties receiving a bulk of state campaign funds irrespective of any current indication of popular support. If the new party is at all inclined to continue its efforts in the political arena, it will be forced to resort to private funding interests. The irony of the situation becomes obvious when it is considered that about the only manner in which a new or minor party can be successful is when it caters to the money influences which the campaign financing act is seeking to play down. It is not inconceivable, then, that the exact result sought to be avoided by public financed campaigns (that being elected officials owing great political favors to those monied interests which provided their campaign funds) will be the necessary rule if the new or minor party is to be successful under the present system. This irony should point to the patent unreasonableness of the Idaho Code section 34-2503(b) distribution formula.

Up to this point, the examination of the campaign finance provisions of the Idaho laws has focused on the near insurmountable obstacles created for the political party whose candidate received only a small proportion of votes in the gubenatorial election preceding the distribution of undesignated funds. Although this situation is clearly a violation of basic Equal Protection principles, another realistic situation presents the invidious classification and discrimmination worked by the law in even sharper clarity. The implicit eligibility requirements of Idaho Code section 34-2503(b) dictate that in order to receive **any** share of the bulk of undesignated funds, a political party must have had a candidate for governor in the last general election. The classification inherent in such a requirement finances only those parties that had a candidate for governor in the election preceding fund distribution, while disqualifying parties not having a candidate from eligibility for receipt of state funds. Such a classification, as will be shown, neither embraces the realities or ideals of our political system, nor does it effectuate the purposes for which the public financing system was created in relation to those parties excluded.

First of all, it is entirely reasonable to assume that a potent political party could be organized and in operation within the time between the last gubenatorial election and the next gubenatorial election. This fact of political life has been accepted by the Court where it stated that, "since the principal policies of major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, the disaffected 'group' (i.e. a new political party) will rarely if ever be a cohesive or identifiable group until a few months before the election." *Williams v. Rhodes, 393 U.S. 23, 33 (1968).*

Taking the possibility of new parties being formed in less time than that between a gubenatorial election, and another general election (in some cases, of course, four years) it can be seen how unreasonable the Idaho scheme for determining eligibility for funds can be. Although Appellants recognize that Idaho has an interest in requiring "some preliminary showing of a significant modicum of support" *Jenness v. Fortson, 403 U.S. 431, 442 (1971),* before distribution of funds to aspirant political parties, the countervailing consideration must be kept in mind that the manner of making such a showing cannot be unreasonable in view of the interests sought to be protected. *Williams v. Rhodes, supra.* In the above case, the public fisc may be protected, but only at the expense of the rights to effective political participation and expression of a group which may well command widespread support. Anytime this results, a careful re-examination of the fundamental fairness of such a classification is needed.

Another factor pointing to the basic lack of rationality of the Idaho eligibility requirement is found in another part of the same chapter in which the campaign financing laws are found in the Idaho Code. In Idaho Code section 34-501, the qualifications and definitions for "political parties" are found which entitle groups to the benefits of official state recognition — sanctioned participation in elections, recognized conventions, nomination of candidates, etc. It is interesting to note that two of three statutory methods for gaining recognition as a valid and bona fide political party in Idaho will **not** entitle the group to any share of the undesignated campaign funds. Neither running three candidates for state or national office nor the petition procedure found in the subsections of Idaho Code section 34-501 would qualify a group for state financing. The State can hardly argue that a new political party might "waste"

public campaign funds on the one hand, when on the other hand it has sanctioned the association of electors to participate in all other important phases of the political process. By adopting these various procedures for attaining state recognition of political party status, the State has implicitly admitted that there are more workable and fair alternatives to the standard found in the campaign finance act as means of indicating the degree of seriousness and support for political parties. It can be argued under this analysis that the withholding of financing from these legitimate and qualified parties is invidious discrimination in direct proportion to the granting of funds to opposing parties. *Harper v. Virginia Board of Elections, supra.*

The state financing system is all the more irrational when it is considered that none of the widely propounded reasons for the utilization of publicly financed campaigns are effectuate in relation to new bona fide political groups. The Court in *Buckly v. Valeo, supra,* identified two prime governmental interest furthered by the public funding scheme examined there, as well as by such schemes as the Idaho system: "eliminating the improper influence of large private contributions" and "relieving major party . . . candidates from the rigors of soliciting private contributions." *96 S.Ct. at 671.* In addition, the Court also found a public interest "in not funding hopeless candidacies with large sums of public money, . . . (which) necessarily justifies the withholding of public assistance from candidates without significant public support." *Id.* On this last point, it was noted that the support requirement would also further the "public interest against providing artificial incentives to 'splintered parties and unrestrained factionalism.'" *Id.* (citations omitted). Although the State might claim other interests in public financing of campaigns, the above three goals represent the paramount motivating

factors in adopting the funding scheme, and should be the focus of examination by equal protection standards. See *O'Neill v. Dent, 364 F.Supp. 565, 578 (1973).*

Unfortunately, the State finance eligibility requirements bear no rational relation to the above legitimate state interests. Parties with significant support (qualifying, for example, under section 34-501) but who did not have a candidate for governor in the last general election, will not receive support under section 34-2503(b). These parties will have to seek private contributions to overcome the advantage given their opponents by the State. They may never succeed in achieving funding parity. Candidates of the party will necessarily be compelled to spend more time fund-raising than their opponents. Placing candidates at that disadvantage, requiring them to seek "catch-up" funds from private sources, increases the opportunity for improper influence and the burden of fund-raising. This is exactly contrary to the purpose of the law.

As has been discussed, the third interest — providing funds only to serious parties and candidates — is similarly unrelated to the discrimination against this type of party. The gubenatorial performance standard clearly has no relation to parties strong years later. Undoubtedly, other more imaginative schemes are available which would treat all parties having substantial voter support more even-handedly. When dealing with fundamental rights of political participation, the Fourteenth Amendment demands the adoption of the most tailored of methods in regulating those rights (see part I).

Finally, the use of the preceding governor's election results as a standard for eligibility for public funds does nothing to prevent state financing of obsolete and all but "dead" parties. In a period of four years, political movements can easily run their life. It is contrary to the

interest expressed in *Buckley* to encourage false life and activity in such movements simply because of substantial measures of support in years passed. *See Storer v. Brown, 415 U.S. 724, 736 (1974).* This type of program hardly discourages the "splintered parties and unrestrained factionalism" discussed in the *Buckley* opinion. Yet, this possibility is very real under the Idaho system.

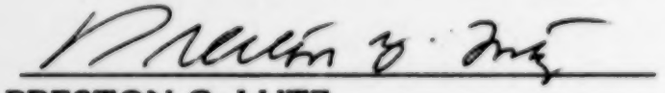
Basic to the problems with section 34-2503(b) is that it "ignores the potential fluidity of American political life", *Jenness v. Fortson, supra at 439,* and serves to artificially perpetuate the political alliances formed at a gubenatorial election held in the past. Legislative enactments which tend to dilute the political strengths of certain elements of the population are constitutionally invalid. *East Carroll Parish School Board v. Marshall, 44 U.S.L.W. 4320 (March 8, 1976); White v. Regester, 412 U.S. 755 (1973); Moore v. Ogilvie, 394 U.S. 814 (1969); Reynolds v. Sims, supra.* The Appellants seek the opportunity to persuade this Court to recognize that this legislative attempt to "aid" in improving the effectiveness of the electoral process misses its goal. In the words of this Court, it has been said of such efforts that "what is demanded may not be so excessive or impractical so as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot. The Constitution requires that access to the electorate be real, not merely 'theoretical'". *American Party of Texas v. White, 415 U.S. 767, 783 (1974) (citations omitted).* The measure of the Appellant American Party's support in 1978 should not be determined in 1974. Whether the Party can be a viable political alternative in 1982 should not be conditioned upon its decision to advance a candidate for governor in 1978.

In challenging this statute, the Appellants are exercising a constitutional protection well known to this Court in that "Equal Protection confers the substantial right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population." *San Antonio School District v. Rodriguez, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring).* This part of the state-adopted electoral process, the funding of political campaigns, falls too short of the equality the Constitution demands.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court grant jurisdiction of this appeal, for plenary consideration with briefs on the merits and oral argument. We believe that the questions presented are substantial and of public importance.

Respectfully submitted,



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APPENDIX A

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State of Idaho

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

THE AMERICAN PARTY OF IDAHO, JOHN McADAMS, individually and as chairman of THE AMERICAN PARTY of Idaho,
Plaintiffs,

— vs. —

CECIL D. ANDRUS, Chairman of the State Board of Examiners, and the Idaho State Board of Examiners; DENNISON C. AMBROSS, Director of the Corporation Department of the Idaho Department of Revenue and Taxation; JOE R. WILLIAMS, Idaho State Auditor; PETE CENARRUSA, Secretary of the State of Idaho; and MARJORIE MOON, Treasurer of the State of Idaho,
Defendants,

IDAHO STATE DEMOCRATIC PARTY,
Intervenor.

Civil No. 1 76 148

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A three judge panel, consisting of Circuit Judge J. Blaine Anderson and District Judges Ray McNichols and Fred M. Taylor, having been convened according to law, and this matter having come on to be heard in open Court at 10:00 a.m. on the 19th day of August, 1976, to consider Defendants' Motion to Dismiss and Motion for Summary Judgment, with Plaintiffs being represented by Preston G. Lutz, Esq., and Frank Benson, Esq., the Defendants being represented by Chief Deputy Attorney General of Idaho, Peter B. Hieser, Jr., Esq., and the Intervenor being represented by Paul J. Buser, Esq., and the parties having submitted various documentary evidence and legal briefs to the Court together with their arguments on the merits herein, and the Court having considered the same, and the Court being fully advised in the premises, rules and enters its order as follows:

1. This Court has jurisdiction over the parties and subject matter of Plaintiffs' Complaint; and

2. Plaintiffs' Complaint fails to state a claim upon which relief can be granted, with Defendants, therefore, being entitled to summary judgment in their favor as a matter of law, it being the opinion of this Court that the cases of *Buckley v. Valeo, U.S. 46 L.Ed. 2d 659, No. 75-436 (Decided Jan. 30, 1976), and American Party of Texas v. White, 415 U.S. 767 (1974),* are dispositive of the legal issues advanced by Plaintiffs herein.

NOW, THEREFORE, IT IS HEREBY ORDERED, AND THIS DOES ORDER, that summary judgment in the above-entitled matter is entered in favor of Defendants and against Plaintiffs.

DATED this 19th day of August, 1976.

/s/ _____
J. Blaine Anderson, Circuit Judge

/s/ _____
Fred M. Taylor, District Judge

/s/ _____
Ray McNichols, District Judge

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 19th day of August, 1976, I served true and correct copies of the above and foregoing ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT upon the attorneys of record herein:

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   ATTORNEY FOR INTERVENOR

by depositing a copy of the same in the United States Mail, first class postage prepaid, in a sealed envelope addressed to said attorneys at the foregoing addresses, which are the last addresses of said attorneys known to me.

/s/ _____
Peter E. Heiser, Jr.

APPENDIX B

IDAHO CODE SECTION 34-501

"Political party" defined —
Procedures for creation of a political party.

(1) A "political party" within the meaning of this act, is an organization of electors under a given name. A political party shall be deemed created and qualified to participate in elections in any of the three (3) ways:

(a) By having three (3) or more candidates for state or national office listed under the party name at the last general election, or

(b) If at the last preceding gubernatorial election there was polled for any one (1) of its candidates for any state or national office, at least three per cent (3%) of the aggregate vote cast for the office of governor, or

(c) By an affiliation of not less than fifteen hundred (1,500) electors, who shall, on or before May 30th, file with the secretary of state a petition that they desire recognition as a political party, which said petition shall contain:

(A) The name of the proposed party.

(B) That the subscribers thereto have affiliated one with another, for the purpose of forming such party.

(C) That the subscribers to such notice intend to nominate at least three (3) candidates for state or national offices whereupon such affiliation shall, under the party name chosen, have all the rights of a political party whose ticket shall have been on the ballot at the preceding general election.

(2) The party or group shall after filing a qualified petition proceed to hold a state convention in the manner provided by law; provided, that at the initial convention of any such newly organized political party, all members of the party shall be entitled to attend the convention and participate in the election of officers and the nomination of candidates. Thereafter, the conduct of any subsequent

conventions shall be as provided by law. The names of the electors so petitioning need not all be on one (1) petition, but may be on one or more petitions but each petition shall be verified by at least one (1) signer thereof to the effect that the signers are qualified electors of the state of Idaho according to his best information and belief. (1970, ch. 140, § 74, p. 351; am. 1971, ch. 130, § 1, p. 511; am. 1976, ch. 344, § 3, p. 1147.)

Idaho Code Chapter 25
Election Campaign Fund

Section 34-2501. Definitions.

As used in this act, the following terms have the following meanings:

(a) "Board" means the state board of examiners provided in section 67-2001, Idaho Code.

(b) "Committee" means the state central committee as provided in section 34-504, Idaho Code.

(c) "Election campaign fund" or "fund" means the fund created by section 34-2502.

(d) "Political party" means an affiliation of electors representing a political group under a given name as authorized by section 34-501, Idaho Code:

(1) "major political party" means a political party which at the last general election polled for any one of its candidates for state or national elective office more than ten per cent (10%) of the vote cast for the office.

(3) "minor political party" means a political party which at the last general election polled for any one of its candidates for state or national elective office more than three per cent (3%) but less than ten per cent (10%) of the vote cast for the office.

(3) "new political party" means an affiliation of not less than fifteen hundred (1500) electors, who shall, on or before the date prescribed by section 34-704, Idaho Code, for filing of declaration of candidacy, file with the secretary of state a petition that they desire recognition as a political party, which said petition shall meet the requirements as otherwise prescribed by law in section 34-501, Idaho Code.

(e) "General election" means the national, state and county election held on the first Tuesday succeeding the first Monday of November of each even numbered year.

(f) "Qualified election expense" means an expense:

(1) incurred by the state central committee in furthering the election of a candidate for office or attempting to influence any election;

(2) incurred within the expenditure report period as defined in this act, or incurred before the beginning of such period to the extend such expense is for property, service, or facilities used during such period;

(3) neither the incurring nor payment of which constitutes a violation of any of the laws of the United States or of the state of Idaho.

(g) "Expenditure report period" means from the day following the primary election (the Tuesday succeeding the first Monday of August in each even numbered year) to the thirtieth (30th) day following the general election. (1975, ch. 132, § 1, p. 290.)

Section 34-2502
Election campaign fund — Creation.

There is hereby created and established in the treasury of the state of Idaho a fund to be known and designated as the "election campaign fund." The state auditor shall maintain within the fund a separate account for each party for which a specific designation is made under the provisions of section 63-3088, Idaho Code, and shall keep a general account for moneys for which no specific designation is made and which are to be distributed as provided in section 34-2503, Idaho Code.

All moneys placed in the election campaign fund are hereby perpetually appropriated to the board of examiners for administration and allocation as provided by this act. All expenditures from the fund shall be paid out in warrants drawn by the state auditor upon presentation of proper vouchers from the secretary of state. The provisions of section 67-3516(3) and (4), Idaho Code, are hereby specifically declared not to apply to the administration of the election campaign fund. (1975, ch. 132, § 2, p. 290; am. 1976, ch. 260, § 1, p. 880.)

Section 34-2503.
Election campaign fund — Distribution.

Each political party, through its central committee, shall be eligible for payments from the fund in the following manner:

(a) Each party shall receive the amount of the fund which has been designated by the contributing individuals and credited to the separate account in the fund maintained for the party.

(b) Ninety per cent (90%) of the fund which has not been designated, but is credited to the general election campaign fund, shall be distributed to the central committees in proportion to the share of the votes cast for the candidate of the party for the office of governor in the last election for governor, provided that no party shall receive more than fifty per cent (50%) of the fund so distributed. Any portion of the fund not distributed shall revert to the fund and, together with the ten per cent (10%) reserved, be distributed in equal portions to all major, minor and new political parties which have qualified candidates for elective state office for the ballot in the next general election.

(c) The distribution provided by this section shall take place on the Tuesday succeeding the first Monday of August in each even numbered year. (1975, ch. 132, § 4, p. 290)

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Phone: 343-1808

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

The American Party of Idaho, JOHN McADAMS, individually and as Chairman of the American Party of Idaho, Plaintiffs,

vs.

CECIL D. ANDRUS, Chairman of the State Board of Examiners, and the Idaho State Board of Examiners; DENNISON C. AMBROSS, Director of the Corporation Department of the Idaho Department of Revenue and Taxation; JOE R. WILLIAMS, Idaho State Auditor; PETE CENARRUSA, Idaho Secretary of State; and MARJORIE MOON, Treasurer of the State of Idaho, Defendants,

Idaho State Democratic Party, Intervenor.

Civil No. 1-76-148

NOTICE OF APPEAL
TO THE
SUPREME COURT
OF THE
UNITED STATES

NOTICE IS HEREBY GIVEN that the American Party of Idaho and John McAdams, the Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the Order and Judgment of a three judge panel of the United States District Court for the District of Idaho, granting summary judgment on a matter of law in favor of the several defendants, and entered in this action on August 19, 1976.

THIS APPEAL is taken pursuant to 28 U.S.C. S1253. Respectfully submitted, November 17, 1976.

/s/ _____
Preston G. Lutz, Boise, Idaho
Counsel for Appellants

STATE OF IDAHO)
County of Ada) ss.

AFFIDAVIT OF SERVICE

PRESTON G. LUTZ, being first duly sworn, deposes and states that on the 17th day of November, 1976, he served the above the foregoing Notice of Appeal upon the several defendants by personal service in hand delivering the same to the designated counsel for the several defendants:

Wayne Kidwell, Attorney General
State of Idaho
Attention: Peter Heiser, Chief Deputy Attorney General
Office of the Attorney General
State Capital
Boise, Idaho 83701

and upon

Paul Buser
Attorney for Intervenors (Idaho State Democratic Party)
One Capital Center
Boise, Idaho

Pursuant to Rule 33 (3) of the Rules of the Supreme Court of the United States, all parties required to be served have thusly been served.

/s/ _____
Preston G. Lutz

SUBSCRIBED AND SWORN TO before me this 17th day of November, 1976.

/s/ _____
Notary Public
Residence: Boise, Idaho

PRESTON G. LUTZ
Attorney for Plaintiffs
1448 W. Bannock
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Boise, Idaho 83707
Phone: 343-1808

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976
No. _____

The American Party of Idaho, JOHN McADAMS, individually and as Chairman of the American Party of Idaho, Plaintiffs,

— vs. —

CECIL D. ANDRUS, Chairman of the State Board of Examiners, and the Idaho State Board of Examiners; DENNISON C. AMBROSS, Director of the Corporation Department of the Idaho Department of Revenue and Taxation; JOE R. WILLIAMS, Idaho State Auditor; PETE CENARRUSA, Idaho Secretary of State; and MARJORIE MOON, Treasurer of the State of Idaho, Defendants

AFFIDAVIT OF SERVICE

IDAHO STATE DEMOCRATIC PARTY,
Intervenor.

ON APPEAL from the United States District Court for the District of Idaho.

STATE OF IDAHO)
County of Ada) ss.

PRESTON G. LUTZ, being first duly sworn, deposes and states that on this 18th day of November, 1976, three copies of the Jurisdictional Statement were hand delivered by personal service to the designated counsel for the several defendants:

Wayne Kidwell, Attorney General
State of Idaho
Attention: Peter Heiser, Chief Deputy Attorney General
Office of the Attorney General
State Capital
Boise, Idaho 83701

and upon

Paul Buser
Attorney for Intervenors (Idaho State Democratic Party)
One Capital Center
Boise, Idaho

I FURTHER CERTIFY that all parties required to be served have been served.

/s/ _____
Preston G. Lutz
Counsel for Appellant

SUBSCRIBED AND SWORN TO before me this 18th day of November, 1976.

/s/ _____
Notary Public
Residence: Boise, Idaho

FILED
FEB 11 1977
MICHAEL RODAK, JR., CLERK

No. 76-699

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE AMERICAN PARTY OF IDAHO,
JOHN MCADAMS,
individually and as chairman of
THE AMERICAN PARTY OF IDAHO,
APPELLANTS

v.

CECIL ANDRUS,
Chairman of the State Board of Examiners, and the
State Board of Examiners;
DENNISON C. AMBROSS,
Director of the Corporation Department of
Revenue and Taxation;
JOE R. WILLIAMS,
Idaho State Auditor;
PETE T. CENARRUSA,
Secretary of the State of Idaho; and
MARJORIE MOON,
Treasurer of the State of Idaho,
APPELLEES

IDAHO STATE DEMOCRATIC PARTY,
INTERVENORS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MOTION TO DISMISS OR AFFIRM BY APPELLEES

WAYNE L. KIDWELL,
Attorney General
State of Idaho

PETER E. HEISER, JR.,
Chief Deputy Attorney General
State of Idaho
Statehouse
Boise, Idaho 83720

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-699

THE AMERICAN PARTY OF IDAHO,
JOHN MCADAMS,
individually and as chairman of
THE AMERICAN PARTY OF IDAHO,
APPELLANTS

v.

CECIL ANDRUS,
Chairman of the State Board of Examiners, and the
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Treasurer of the State of Idaho,
APPELLEES

IDAHO STATE DEMOCRATIC PARTY,
INTERVENORS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MOTION TO DISMISS OR AFFIRM BY APPELLEES

The Appellees in the above-entitled case, pursuant to Rule 16 of the Rules of the Supreme Court of the United States,

move to dismiss or affirm the Order Granting Defendants' Motion for Summary Judgment of the District Court below on the grounds that the Court below lacked subject matter jurisdiction over the claims advanced Appellants and that the question presented is so insubstantial as to not need further argument.

STATEMENT

This is a direct appeal from an Order Granting Defendants' Motion for Summary Judgment entered on the 19th day of August, 1976, by a District Court constituted of three judges specially constituted pursuant to 28 U.S.C. §§2281 and 2284 to hear Appellants' attack on the constitutionality of a State of Idaho statute which provided for a certain type of financing distribution for political parties in the State of Idaho.

SUMMARY OF ARGUMENT

1. Appellants, in their Complaint below, brought this action in behalf of the American Party of Idaho, an unincorporated political party consisting of an association of individuals, and John McAdams, individually, and as Chairman of said political party. Jurisdiction of the United States courts was alleged under 28 U.S.C. §1331, federal question jurisdiction, and 28 U.S.C. §1343, as the same relates to jurisdiction for actions cognizable under the Civil Rights Act of 1871 [42 U.S.C. §1983]. Appellees, Defendants below, challenged Appellants' assertion of federal question jurisdiction claiming that it was not possible for them to meet the $10,000.00 amount in controversy requirement of 28 U.S.C. §1331, and also challenged civil rights act jurisdiction on the grounds that the American Party of Idaho, not being a corporation or styled as a class action, was not a "person" under the purview of 42 U.S.C. §1983 or its corresponding jurisdictional statute 28 U.S.C. §1343. Further, Appellees challenged the standing

of individual Appellant John McAdams to maintain the action on either jurisdictional ground advanced due, again, to the lack of amount in controversy and lack of any allegation in Appellants' (Plaintiffs') Complaint of any individual, personal, injury to Plaintiff McAdams. Though the District Court below did "find" jurisdiction of the case, the Court refused to state upon what jurisdictional statute they based their order granting jurisdiction. Appellees maintain that, under the facts and jurisdictional statutes alleged in the Complaint below, the District Court was absolutely without subject matter jurisdiction and should have dismissed the Complaint.

2. Even assuming that the District Court was correct in finding jurisdiction and hearing the merits of the case on summary judgment motion, the conclusion of the Court so clearly spelled out that the challenged statutory subsection of the Idaho Code relating to distribution of "undesignated" campaign finance monies raised through a state check-off system built into the Idaho tax return forms was not a denial of equal protection of the laws that it would be a waste of this Court's time to relitigate an issue decided below upon well settled principles of constitutional law. Appellants sole challenge to the distribution scheme was that the same violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Since the scheme did not fall within any of the traditional suspect categories which require a court to apply the "strict judicial scrutiny" or "compelling state interest" tests for equal protection challenges, and since the scheme certainly comported with the decisions of this Court relating to the "rational basis" test, it was quite proper for the Court below to conclude that the *Buckley v. Valeo*, 424 U.S. 1 (1976), and *American Party of Texas v. White*, 415 U.S. 767 (1974), cases were dispositive of the contentions raised by Appellants, and that Appellants were entitled to summary judgment as a matter of law.

ARGUMENT

I. FEDERAL COURTS MAY NOT ASSERT FEDERAL QUESTION JURISDICTION OVER CASES BROUGHT BEFORE THEM UNLESS SUCH CASES DEMONSTRATE AN ACTUAL AMOUNT IN CONTROVERSY IN EXCESS OF $10,000.00

In their Complaint herein, Plaintiffs sought to invoke the jurisdiction of the United States District Court pursuant to 28 U.S.C. §1331 relating to federal questions. Under this statute a plaintiff must pass a two-step threshold test to meet jurisdictional requirements. First, a plaintiff must present to the Court a matter in controversy which "arises under the Constitution, laws, or treaties of the United States." The second requirement is that "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs." Though Plaintiffs baldly alleged in their Complaint that this instant controversy is cognizable under the Fourteenth Amendment to the United States Constitution, involving a denial of equal protection of the laws, Plaintiffs cannot and do not meet the second part of the jurisdictional "test" in that they do not present a matter in controversy which exceeds the sum or value of $10,000. Defendants submit that there is no method of computation of monies to which Plaintiffs might be entitled by distribution of the political party contributions in dispute herein which would rise to the over-$10,000 level. Taking the figures supplied by Plaintiffs in Exhibit "C" to their Complaint, the following "amounts in controversy" may be computed:

Average American Party Vote	14,882	=	x	$ to Am. Party
Average Democrat Party Vote	145,551		18,664	$ to Dem. Party

x = $1,908.31

High American Party Vote	31,560	+	x	$ to Am. Party
High Democrat Party Vote	184,182	=	18,664	$ to Dem. Party

x = $3,198.13

High American Party Vote	31,570	=	x	$ to Am. Party
Avg. Democrat Party Vote	145,551		18,664	$ to Dem. Party

x = $4,048.22

Thus, under no possible method of computing what the American Party *might* have received as "designated" monies through the Idaho tax checkoff procedure, based on the performance of the American Party at the polls in the 1974 Idaho General Election, could said political party come close to meeting an "over-$10,000" amount in controversy claim. This contention holds true even when the amount of funds to which the American Party would be entitled through distribution of "undesignated" funds (the sum of $1,358.15) is added to the potential "designated" funds amounts.

Reaffirmation of the requirement that there be a $10,000 amount in controversy for federal question jurisdiction was made by this Court as recently as 1972. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). As constitutional scholar Charles Alan Wright has noted, it is unfortunate that this monetary requirement for assertion of federal question jurisdiction exists, especially in cases where a federal forum seems most appropriate or where none but a federal forum would allow pursuit of the proposed litigation. 13 FEDERAL PRACTICE AND PROCEDURE, *Federal Question Jurisdiction* §3561, pp. 392-393 (Wright, Miller and Cooper ed., West 1975). However, the text writers note:

> This situation has aroused some commentators and led them to urge the courts to cure the gap on their own. A few courts have responded to this invitation, either by taking a very relaxed view of what must be shown to satisfy the statutory requirement, or by questioning the constitutionality of the amount requirement as applied to these cases, or by announcing that constitutional rights are worth more than $10,000. Fortunately the great majority of courts have resisted this temptation and have declined the invitation to invent jurisdiction for themselves that Congress has not yet seen fit to grant. Congress ought to amend Section 1331 by deleting the amount in controversy requirement, but until it does the courts must apply the statute as it exists and has histori-

cally been construed. [Footnotes omitted.] *Id.* at pages 394-396.

Though the Congress recently passed Public Law 94-574 [90 Stat. 2721 (1976)] which removed the $10,000 amount in controversy requirement for actions against the United States, such dollar amount requirement remains for all other federal question cases. S. 800, which ultimately became Public Law 94-574, as originally considered would have removed the $10,000 amount in controversy requirement for *all* federal question cases brought under §1331; the bill as passed reflects a continuing Congressional intent that the jurisdictional amount is necessary for federal question jurisdiction in all cases except those which are brought against the United States and officers or entities thereof. See also the excellent discussion of amount in controversy requirement of §1331 by Judge Donald Russell in *McGaw v. Farrow,* 472 F.2d 952, 955 (4th Cir. 1973).

The United States Court of Appeals for the Ninth Circuit has ruled that if a defendant challenges a plaintiff's allegation of a $10,000 amount in controversy that the plaintiff has then the burden of asserting specific facts which will justify the $10,000 jurisdictional amount. *Rincon Band of Mission Indians v. County of San Diego,* 495 F.2d 1, 8 (9th Cir. 1974), *cert. denied* 419 U.S. 1008. Defendants herein did make such a challenge. Though certain federal District Courts within the Ninth Circuit had often rejected the traditional interpretation of the requisite jurisdictional amount in controversy of over $10,000, recent appellate court decisions have reiterated the *need* to meet that requirement. *Bowers v. Campbell,* 505 F.2d 1155 (9th Cir. 1074) [claim of racial discrimination in military personnel practices by former civilian employee]; *Ybarra v. Town Los Altos Hills,* 503 F.2d 250, 253 (9th Cir. 1974) [zoning ordinance]; *Rincon Band of Mission Indians v. County of San Diego, supra,* 495 F.2d at pages 6-8 [raising the issue of jurisdictional amount *sua sponte* in a case involving

a conflict of federal Indian law and a county building code]. Defendants submit that the Court below failed to exercise the necessary judicial scrutiny into jurisdictional amount, and wrongfully ruled that jurisdiction existed in this case.

II. AN "AFFILIATION OF ELECTORS REPRESENTING A POLITICAL GROUP" IS NOT A "PERSON" WITHIN THE MEANING OF THE CIVIL RIGHTS ACT OF 1871.

The Civil Rights Act of 1871 [42 U.S.C §1983] provides redress whenever a person "subjects, or causes to be subjected, any citizen ... or other person" to a deprivation of federally created civil rights to which they are entitled. It is clear from the allegations of Plaintiffs' Complaint that John McAdams, the individual Plaintiff named therein, is considered merely in a representative capacity as head of the Plaintiff political party and although on the Complaint "individually" has alleged no individual wrong to himself as a person. By virtue of Paragraph II, 2, at page 1 of said Complaint, the Plaintiff American Party of Idaho is styled as "affiliation of electors representing a political group." Defendants submit that such an organization is not a "citizen" or "person" within the ambit of protections afforded by the Civil Rights Act of 1871. Though this Court specifically ruled that labor unions *may* sue under §1983 as "persons" deprived of rights secured by the Constitution and laws, in *Allee v. Medrano,* 416 U.S. 802 (1974), it should be noted that that case was brought as a class action, as opposed to the instant case which is brought merely in the name of the political organization with the addition of a named individual who alleges no wrong to himself as an individual. See *Allee, supra,* fn. 13, 416 U.S. at page 819. At any rate the *Allee* case is distinguishable, as are other cases in which this Court has granted standing to certain labor or welfare rights organizations, in that:

The statements in those opinions that the organi-

> zation has standing to assert the rights of its members were made in the context of a claim of abridgment of the constitutional right of association; indeed, in all but the last case [*N.A.A.C.P. v Button,* 317 U.S. 415, 428-429 (1963)], the right to refrain from disclosure of membership because of the adverse effect of disclosure on both the association and the members was the very point at issue. ... While the Court said in Sierra Club v. Morton, *supra,* 405 U.S.at 739, 92 S.Ct. at 1368, "[i]t is clear that an organization whose members are injured may represent those members in a proceeding for judicial review," [followed by a citation to *Button*] we think this must be limited to the issue there *sub judice,* standing to seek review of the action of federal officers, and not as broadening the standing of organizations as plaintiffs under the Civil Rights Act. *Aguayo v. Richardson,* 473 F.2d 1090, 1100 (2d Cir. 1973), *stay denied* 410 U.S. 921, *cert. denied* 414 U.S. 1146.

When one is deprived of his civil rights the injury is to his person and he is the only one who has standing to sue under §1983. *Krum v. Sheppard,* 255 F. Supp. 994 (W. D. Mich. 1966), *aff'd.* 407 F.2d 490 (6th Cir. 1967). It has also been held that an organization of women did not have standing to speak for its members in a civil rights case. *Nat'l Organization for Women - New York Chapter v. Goodman,* 374 F.Supp. 247 (S.D. N.Y. 1874). It has further been held that an association organized to eliminate racial discrimination had no standing in and of itself to bring an action under §1983. *Louis v. Pennsylvania Indus. Development Authority,* 371 F.Supp. 877 (E.D. Pa. 1974), *aff'd* 505 F.2d 730 (3rd Cir. 1974). Defendants submit that these cases represent a proper application of the law. Just as in the above cases, Plaintiff American Party of Idaho has no standing as a "person" to maintain this action under 42 U.S.C. §1983, nor should that statute be expanded by judicial interpretation beyond its plain reference to "persons" and "citizens" when an organization such as the political party herein, has ample

opportunity to attempt otherwise to allege injury to individual members ("persons") singly or through class action.

III. PLAINTIFF JOHN McADAMS HAS NO STANDING TO MAINTAIN THIS ACTION.

Defendants further submit that Plaintiff John McAdams has no standing to maintain this action since, though he certainly is a "person" within the meaning of the Civil Rights Act of 1871 [42 U.S.C. §1983], he suffers no alleged wrong as an individual under the facts of Plaintiffs' Complaint due to the fact that the remaining state statutory subsection under contention herein relates solely to distribution of funds to political parties — a situation in which no individual is "wronged." Moreover, said Plaintiff appears in the action as an individual solely in his capacity as the Chairman of the American Party of Idaho which, as an association and not a "person," has no standing itself. [Complaint, ¶II, 2, at p. 1]

IV. THE CIVIL RIGHTS ACT OF 1871 PROVIDES RELIEF FOR WRONGS WHICH HAVE ALREADY OCCURRED, BUT MAY NOT BE USED TO ENJOIN AN ANTICIPATED WRONG WHERE THERE IS NO HISTORICAL PROOF THAT THE ANTICIPATED WRONG WILL CAUSE THE ALLEGED ANTICIPATED HARM.

Plaintiffs sought to enjoin action under a state statutory subsection which had never before been utilized. Since 1976 was the first year in which action could be taken under the state statutory subsection there was no history of action thereunder which *had* harmed the Plaintiffs herein. What Plaintiffs sought was that the court below should enjoin a "probable" or "likely" course of action which, they alleged, would work to their detriment. The Civil Rights Act of 1871, however, is designed to provide relief *only* for action which *does* "subject" or "cause to be subjected" some person to the deprivation of constitutionally guaranteed rights. Since

nothing had yet happened and since there was no past history of an occurrence under the challenged statutory subsection, no harm for which redress might be had at the time of filing their Complaint occurred to these Plaintiffs. The absence of an allegation of present wrong prevented the court from enjoining future alleged wrongs. *Manion v. Holzman,* 379 F.2d 843 (7th Cir. 1967), *cert. denied* 389 U.S. 976. A mere intention to take some action at some time in the future which, if it occurred, might present a situation within the purview of 42 U.S.C. §1983 does not, before the occurrence, present a justiciable question under the Civil Rights Act of 1871. *Progress Development Corp. v. Mitchell,* 182 F.Supp. 681 (E.D. Ill. 1960), *aff'd in part, rev'd in part, on other grounds* 286 F.2d 222 (7th Cir. 1961).

V. THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT REQUIRE ABSOLUTE EQUALITY OR PRECISELY EQUAL ADVANTAGES.

This court noted in *Norvell v. State of Illinois,* 313 U.S. 420 (1963), *reh. denied,* 375 U.S. 870, that:

> Exact equality is no prerequisite of the equal protection of the laws within the meaning of the Fourteenth Amendment. [Citations omitted.]
>
> "... the Fourteenth Amendment enjoins 'the equal protection of the laws' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." 373 U.S. at pp. 423-424.

In *Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans,* 330 U.S. 552 (1947), *reh. denied* 331 U.S. 864, this Court held:

> A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. 330 U.S. at p. 556.

As stated by Justice Stewart, concurring in the decision in *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973) *reh. denied* 411 U.S. 959:

> Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.
>
> There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. In with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory — only by classifications that are wholly arbitrary or capricious. [Citation omitted]. This settled principle of constitutional law was compendiously stated in Mr. Chief Justice Warren's opinion for the Court in *McGowan v. Maryland,* [citation omitted], in the following words:
>
> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 411 U.S. at pp. 59-61.

And, as ruled in *Robinson v. Board of Regents of Eastern Kentucky University,* 475 F.2d 707, 710 (6th Cir. 1973): "The equal protection clause does not require identical treatment

for all people. The states retain, under the Fourteenth Amendment, the power to treat different classes of people in different ways." See also, *Ross v. Moffitt*, 417 U.S. 600 (1974); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Tucker v. Hardin*, 430 F.2d 737 (1st Cir. 1970).

VI. A CASE INVOLVING FINANCING OF POLITICAL PARTIES AND A CHARGE OF DENIAL OF EQUAL PROTECTION OF THE LAWS IS TO BE ANALYZED UNDER THE "RATIONAL BASIS" TEST, AS OPPOSED TO THE "STRICT JUDICIAL SCRUTINY" OR "COMPELLING STATE INTEREST" TESTS.

Recently this Court had occasion to consider exhaustively the applicability of the "compelling state interest" or "strict judicial scrutiny" tests as applied to questions submitted on equal protection grounds, in *San Antonio School District v. Rodreguez*, 411 U.S. 1, 28 (1963), and stated:

> However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to a system that allegedly discriminates against a large, diverse, and amorphous class, ***. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities or subjected to a history of such purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

In *Rodriguez* the appellees contended that there was an inextricable nexus between education (not among the rights afforded explicit protection under the United States Constitution) and the constitutionally protected right of First Amendment freedom as well as the intelligent utilization of the protected right to vote. The argument was that the effective utilization of these fundamental constitutional rights was dependant upon a person's ability to "read, assimilate, and utilize available knowledge." [411 U.S. at p. 35.] This

Court further stated:

> A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends upon an informed electorate: a voter cannot cast his vote intelligently unless his reading skills and thought processes have been adequately developed.
>
> We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and vote. Yet we have never presumed to possess either the ability or authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. [Emphasis in original.] That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities. 411 U.S. at pp. 35-36.

An apt analogy may be made to the situation in the case at bar. Involved herein is *not* the constitutionally protected right to vote, but, instead, the unprotected situation of state involvement in a scheme to distribute financial support to political parties. In no way does this financing scheme directly involve or affect the fundamental right to exercise the voting franchise. Yet, as in the situation of financing education, the state scheme *indirectly* relates to a constitutionally guaranteed right — the right to vote. Defendants submit, however, that just as there is no guarantee to the citizenry of the most *informed* electoral choice, there is no guarantee to the citizenry that the state shall somehow assist in the financing (directly or indirectly) of the electoral process. Undoubtedly, a cogent, appealing argument can be made regarding inability to inform the electorate adequately of

political philosophy and political candidates if a political party is underfunded — with or without state participation in the political party financing process. However appealing such an argument may be, there is no way that the underlying foundation — financing of the political process — *can* rise to the level of a right which is guaranteed by our federal Constitution. The political party financing methods in any state, by any means that is not manifestly unfair under "rational basis" standards, does not warrant judicial intrusion into legitimate state activities. There can be no doubt that the financing scheme herein, which takes monies which otherwise would go into the General Fund of the State of Idaho and allows those funds so designated by taxpayers to be distributed by the State to political parties, *is* a "revenue and taxation" measure. This Court again recognized its role in assessing such laws in *Rodriguez* by holding:

> We need not rest our decision, however, solely on the inappropriateness of the strict-scrutiny test. A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. ... We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. ... ... [A]ppellees would have the Court intrude in an area in which it has traditionally differed to state legislatures. This court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause: [directly quoting at length from *Madden v. Kentucky,* 309 U.S. 83, 87-88 (1940); additional citations omitted.]
>
> Thus, we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising *and disposition* of public revenues. [Emphasis supplied.] Yet, we are urged to

> direct the States either to alter drastically or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed upon property, income, or purchase of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause. 411 U.S. at pp. 40-42.

Just as the Court has moved cautiously in the area of state action "with the respect to the raising and distribution of public revenues," so should it respect the right and ability of the State of Idaho to carve out for its populous an adequate, rational formula for collection and distribution of revenues designed to assist in the financing of the political party process. As further recognized in *Rodriguez:* "The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest." [411 U.S. at p. 55.]

And what of the classifications created in the case at bar? Though the statutory scheme speaks in terms of "major" and "minor" political parties, and the like, the distribution of "undesignated" funds which remains in controversy herein goes to *all* political parties, with a ceiling amount of fifty percent of the fund limited to any one political party, regardless of the percentage of support that party's gubernatorial candidate received at the last general election. Such a "ceiling," while acting as a detriment to the political party with over-fifty percent of the gubernatorial vote (such as the Democrats in 1974, with approximately 73% of such vote), inures to the benefit to "smaller" or "minor" political parties which stand to pick up a proportioned bonus from the redistribution of the over-fifty percent amount. The entire amount of ninety percent of the "undesignated" fund monies is distributed to all political parties according to the percen-

tage of the gubernatorial vote their candidate received at the last general election for that office (together with the apportioned over-fifty percent distribution). Such a method of distribution comports with the expressed attitudes of the Idaho electorate of support for that particular party and its candidate. Idaho has chosen to distribute ten percent of the "designated" fund monies on an across-the-board equal apportionment basis, thus recognizing that there is a threshold interest in the state in having *some* funding for each and every political party regardless of its demonstrated popular support. While it seems plausable to accept this threshold support rationale for the small 10% portion of the checkoff fund monies "undesignated" for any political party, it would be manifestly unfair for "major" parties to have such a straight-line distribution made of the entire amount of "undesignated" fund monies inasmuch as such a distribution would not at all reflect the expressed nature of electorate support for the various political parties as evidenced by popular vote. An across-the-board, straight-line, distribution of all "undesignated" fund monies which create a discrimination against the "major" political parties in favor of the "minor" political parties which would be entirely out of proportion to voter sentiment and support of the various political parties. Defendants submit that the State of Idaho has chosen a manifestly "rational basis" for distribution for the "undesignated" fund monies. Concurring in the majority opinion of *Rodriguez,* Mr. Justice Stewart reminded: There is hardly a law on the books that does not affect some people differently than others." [411 U.S. at p. 60.] Yet, as Mr. Justice Stewart further noted, only classifications that are wholly arbitrary or capricious fall under the application of Equal Protection Clause sanctions. [*Ibid.*] Defendants grant that the challenged statutory subsection's effect affects some political parties differently than others. Yet, such differences do not rise to the level of being "wholly arbitrary or

capricious" and are sufficiently set forth to provide *effective* equality so as to meet a judicial "rational basis" test.

VII. THE CAMPAIGN FINANCING LAWS APPROVED BY THE UNITED STATES SUPREME COURT IN SEVERAL CASES PROVIDE FOR LESS "EQUALITY" OF FUNDING AND DISTRIBUTION OF MONIES THAN DO THE IDAHO LAWS RELATING TO SUCH FUNDING AND DISTRIBUTION.

The case of *Buckley v. Valeo,* 424 U.S. 1 (1976), through its validation of the Presidential Primary Matching Account and other specific language, has unquestionably upheld the principle of keying the distribution of public funds to candidates or parties based on the public support which they enjoyed. The case of *American Party of Texas v. White,* 415 U.S. 767 (1974), has also recently upheld this principle. This funding principle is also directly analogous to the indirect public financing of political parties and candidates provided by tax credits and deductions. Furthermore, plaintiffs have not suggested any system which would function in a more equitable fashion than already exists under Idaho law. In *Buckley,* in upholding public financing, this court said, in part:

> ... Congress was legislating for the "general welfare" — to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fund raising. [424 U.S. at p. 91.]

In *American Party of Texas v. White,* several minor parties sought positions for a slate of candidates on the general election ballot. Under Texas law, minor parties could achieve ballot positions *only* through party conventions or a petition process, while the major parties used *solely* a primary system. Texas provided for public financing from state revenues for primary elections only for those political parties casting 200,000 or more votes for governor in the last

proceeding general election. The law precluded public funding to minor political parties to reimburse them for their costs in obtaining ballot position. Thus, no financing by the State of Texas was provided for any nominating method *except* that of the primary elections, which primary elections are required of those political parties which fielded a gubernatorial candidate at the last election for that office who received more than twenty percent of the total votes cast for the office of governor. Obviously, the primary election requirement in Texas affects only "major" political parties. Those political parties with no gubernatorial candidate, or whose gubernatorial candidate received twenty percent or less than the total vote for the office of governor, *must* nominate their candidates by convention, and no state financing whatsoever is provided for conventions or nominations provided thereby, nor is state financing available for any nonpartisan or independent candidates who qualify for inclusion on the official ballot. Yet, "major" political parties *are* entitled to receive three-forths of their allowable expenses for the conduct of their required primary election. This court considered the Texas financing procedure and upheld the same in its decision in *American Party of Texas v. White,* 415 U.S. 767, 791-795 (1974), in which it noted that the Texas system did not have a "real and appreciable impact upon the exercise of the franchise." [Id. at 792-794.]

Turning, next, to the applicable Idaho law now in controversy, relating to distribution of "undesignated" monies credited to the election campaign fund [§34-2503 (b), *Idaho Code;* 1975 Idaho Session Laws, ch 132, §4(b)], the formula provided therein must be scrutinized in light of what this Court has endorsed in both the *Buckely v. Valeo* and *American Party of Texas* cases. Subsection (b) provides that ten percent (10%) of all "undesignated" monies, together with any undistributed aportions of the entire election campaign fund, shall "be distributed in equal portions to all

major, minor and new political parties which have qualified candidates for elective state office for the ballot in the next general election." Obviously, this distribution scheme contains an absolute "equality" for all parties. The remaining ninety percent (90%) of "undesignated" monies are distributed according to a formula which allows a single political party to receive no more than fifty percent of such fund. Thus, relating that portion of the distribution scheme to the facts of the last Idaho general election where the candidate of the Democratic Party received approximately 73 percent of the total vote cast, it is obvious that the Democratic Party "suffers" from the fifty percent ceiling on distribution of "undesignated monies," while the American Party benefits therefrom. The Democratic Party has not complained that this formula is in any way inequitable. The American Party, suffering no loss (and, actually, receiving a gain) from the formula, has no standing to complain that it is in some way short-changed by the fifty percent ceiling. In all other respects, distribution of the "undesignated" monies is accomplished "in proportion to the share of the votes cast for the candidate of the party for the office of governor in the last election for governor." [§34-2503(b), *Idaho Code.*] Thus, distribution of the majority of the "undesignated" fund monies is made in direct proportion to the interest demonstrated by Idaho voters in the political party to which money is distributed as evidenced by popular vote of the Idaho voters for that political party's candidate for governor. A party with no gubernatorial candidate will, of course, receive only the money from the equally apportioned ten percent of undesignated funds rather than any portion of the ninety percent of the fund monies. But, this method of "keying" distribution of funds to the popular vote for the office of governor was precisely the method of "keying" distribution funds which was approved by this Court in the *Buckley v. Valeo* and

American Party of Texas cases. Moreover, it is submitted that Idaho's scheme for distribution of "undesignated monies" is inherently more fair and equitable than that employed by Texas inasmuch as all Idaho political parties (regardless of whether they are categorized as "major" or "minor") share in such distributional scheme. "Minor" political parties are even benefited by the ceiling of fifty percent imposed on any one party, thus allowing a party whose candidate received a small percentage of the gubernatorial vote to receive that percentage of "undesignated" funds together with a pro-rata share of the over-fifty percent funds which otherwise would have been available to the party whose candidate amassed more than fifty percent of the vote for governor, plus an absolutely equal distribution of the ten percent "reserved" funds which have not been "designated."

Comparing the Idaho scheme for distribution of "designated" fund monies with the basic scheme for distribution funding in Texas, it is clear that the Texas provisions appear manifestly "unfair" by Idaho standards. Yet, the Texas scheme was approved by this Court. It will be noted that *only* the "major" political parties, which receive more than twenty percent of the vote for their gubernatorial candidate at the last election and which must, therefore, hold primary elections, receive money from the State of Texas. Yet, political realities dictate that the political conventions *required* of other political parties in Texas are expensive to conduct. Texas, however, provides no funding whatsoever for these conventions, even though the parties holding the same may have fielded candidates who polled up to twenty percent of the Texas gubernatorial vote. Certainly, it is true that such political conventions do not receive the same voter attention, awareness, and concern that are an inherent part of a primary election process. In a primary election, political parties spend many hours and, often, many thousands of dollars in bringing their candidates to the attention of the electorate.

Such name identification and candidate awareness create an advantage for those candidates participating in the primary election process which is *denied* by Texas law to those political parties which *must* nominate by convention. Yet, *only* the political parties conducting primary elections receive reimbursement for three-fourths of their expenditures. Idaho's funding and distributional scheme is, on its face, as well as in practice, inherently more equitable than the Texas scheme sanctioned by this Court. It must, therefore, follow that in Idaho the Fourteenth Amendment's equal protection clause is well served by the distribution plan adopted by the Idaho Legislature in §34-2503(b), *Idaho Code*.

CONCLUSION

For the above and foregoing reasons, and in light of the above authority, it is respectfully submitted that this appeal be dismissed or that the decision of the three-judge Court below be affirmed.

DATED this 9th day of February, 1977.

Respectfully submitted,

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By _____
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ATTORNEYS FOR APPELLEES

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Peter E. Heiser Jr., Chief Deputy Attorney General of Idaho, being first duly sworn, deposes and certifies that on this 9th day of February, 1977, two copies of the Motion to Dismiss or Affirm, by the State of Idaho were mailed, postage prepaid, to Counsel for the Appellants at the following addresses.

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I further certify that all parties required to be served have been served.

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Subscribed and sworn to before me this 9th day of February, 1977.

/s/ Lois W. Hurless

Notary Public for Idaho
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NOTARY

COPY

Supreme Court, U. S.
FILED
FEB 7 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-699

THE AMERICAN PARTY OF IDAHO,
JOHN McADAMS,
individually and as chairman of
THE AMERICAN PARTY of Idaho, Appellants,

vs

CECIL ANDRUS, Chairman of the
State Board of Examiners, and the
Idaho State Board of Examiners;
DENNISON C. AMBROSE, Director of the
Corporation Department of Revenue and
axation; JOE R. WILLIAMS, Idaho
State Auditor; PETE CENARRUSA,
Secretary of the State of Idaho;
and MARJORIE MOON, Treasurer of
the State of Idaho, Appellees.

IDAHO STATE DEMOCRATIC PARTY, Intervenor

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MOTION TO AFFIRM BY INTERVENOR/RESPONDENT

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I.

MOTION TO AFFIRM JUDGMENT

COMES NOW the Intervenor/Respondent and hereby respectfully moves this Honorable Court, pursuant to United States Supreme Court Rules 16, 33, 35 and 39, to take the following requested action:

Affirm the Judgment sought to be reviewed on appeal from the United States District Court for the District of Idaho on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and for other reasons stated in the accompanying brief.

II.

CONTENTS OF BRIEF IN GENERAL

Pursuant to United States Supreme Court Rule 40 (3), (4) and (5), the Intervenor/Respondent will not reiterate a statement of the case nor will it include information as permitted by sections 1a, 1b, 1c and 1d of said rule inasmuch as there are no significant omissions or inaccuracies in Appellants' statement of the case nor is Intervenor/Respondent dissatisfied with the Appellants' presentation of sections 1a, 1b, 1c and 1d of said rule.

III.

THE PRESUMPTION OF CONSTITUTIONALITY FAVORS VALIDATION OF THE IDAHO ELECTION CAMPAIGN FUND ACT

The basic concept that state legislatures are presumed to have acted within their constitutional powers,

notwithstanding the fact that, in practice, some inquality may result, should be applied to the Idaho Election Campaign Fund Act dispute. The Idaho legislature's discretion, embodied in the Act (Sections 34-2501 et seq, *Idaho Code)* should not be set aside merely because its decision was "discriminating." If any state of facts reasonably may be conceived to justify the Act, it should be upheld. As was stated by *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961):

> The Constitutional safeguard is offended only if the classification rests on ground wholly irrelevant to the achievement of the State's objective.

In this case the Idaho legislature designed a law which allowed citizens individual input on a one-person, one-vote basis by giving concerned citizen voters an opportunity to designate on their individual state income tax returns one of three categories whereby designation gave evidence and authority for the Appellees to distribute money for political campaigns to various political parties in Idaho as directed by the Election Campaign Fund Act. The alternative categories were these: (1) to "check off" a political party which had its name on the tax return form, (2) to specify a particular party for the one dollar "tax gift" when the taxpayer's preferred party name was not on the return form, (3) to check off an undesignated category whereby the taxpayer waived his or her right to have the tax gift go to one party only.

The "check off" alternative of financing political campaigns is not difficult or unusual. At least seven states in this nation use tax deductions, check-offs or

credits as a means of encouraging citizens to contribute to the political process. Comment, "Going Public: Reforming Oregon's Campaign Finance System", 55 Oregon L. Rev. 446 (1976); See also, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, LEGISLATIVE APPROACHES TO CAMPAIGN FINANCE, OPEN MEETINGS AND CONFLICTS OF INTEREST 16-17 (1974). In reality, taxpayers are deferring to legislative judgment with regard to the differential treatment of candidates and political parties. See Comments on *Buckley v. Valeo*, 96 S. Ct 612 (1976) at 76 Columbia L. Rev. 852 (1976) and 24 Kansas L. Rev. 345 (Part I) and 537 (Part II) (1976).

The Idaho tax check-off system is a vehicle created by the state for political contributions which, in turn, are themselves a form of political expression protected by the First Amendment of the United States Constitution. The doctrine of one person, one vote should apply not only to the value of an individual's ballot, as in reapportionment cases, but also to the whole electoral process. In the instant case, that process begins with the individual state income tax return. To deny a taxpayer the opportunity of checking a category of undesignated political parties to receive the one dollar tax gift is to deny the principle of one person, one unit of political influence.

Of course, Section 4 (b) of the Idaho Election Campaign Fund Act limits the amounts of dollars a particular political party can receive. However, the limitations are also made with a view to recognizing minor-

ity interests in the political process. Specifically, as to designated funds, no party shall receive more than 50% of the funds regardless of the amount of popular support of that party. As to undesignated funds, no party, whatever its size or popular support, can receive a smaller or larger share of such fund than any other party.

The Idaho legislature has indeed been discriminating, but the effect of the law at issue is not one which constitutes invidious discrimination, a compelling threat to constitutional democracy or a significant interference with protected rights of political association. "Neither the right to associate nor the right to participate in political activities is absolute." *United States Civil Service Comm'n v. National Association of Letter Carriers*, 413 U.S. 548, 567 (1973).

The Intervenor/Respondent recognizes the American Party of Idaho has a First Amendment right to engage in discussion of public issues and to vigorously and tirelessly advocate the election of its own candidates. Nevertheless, it is saying that because the majority stays the majority, the law is wrong. On the contrary,

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. *Buckley v. Valeo*, *supra* at 649.

Appellants are denying the democratic principle of majority rule in saying, because the "incumbent"

powers, the Idaho State Democratic and Republican parties, retain control over the quality and range of debate on public issues in a political campaign, there is a fundamental unfairness in an act which assists them further. Even if this is true, the Idaho legislature must still balance its interest in having to fund hopeless candidacies with sums of money from the undesignated funds provided for by the Act.

The United States Constitution does not require the State of Idaho to provide more money to finance the efforts of "every nascent political group seeking to organize itself" just because it has chosen a pattern of campaign finance assistance based upon the popular vote and determinants which can be drawn from it. *American Party of Texas v. White*, 415 U.S. 767, 794 (1974); *Buckley v. Valeo, supra at* 672-673. The formula of campaign assistance does not have to be precise.

The presumption of the constitutionality of the Act has not been sufficiently rebutted by the Appellants. *McDonald v. Board of Election Commissioners*, 413 U.S. 458, 567 (1973).

IV

THERE IS NO INVIDIOUS CLASSIFICATION OF POLITICAL PARTES FOSTERED OR PROMOTED BY THE DISTRIBUTION OF UNDESIGNATED FUNDS AS DIRECTED BY STATUTE

The claim of invidious discrimination by the Appellants does not hold muster because there is no record evidence of same. This Court has stated that under

these circumstances courts should generally be "hesitant to invalidate legislation which on its face imposes even-handed restrictions." *Buckley v. Valeo, supra* at 641. Had Appellants demonstrated a measurable quantity of community and voter support at the Three-Judge District Court level, that Court may well have found the Act to be an excessive and impractical burden upon Appellants. Yet, Appellants have offered no new or better determinants for the legislative objective of assisting political parties in their financing of political campaigns. Absent information other than past political support as represented by popular vote totals, the claims of Appellants are purely speculative as to what could happen in a hypothetical situation which might later occur.

The Abstract of Votes cast at the General Election on November 5, 1974 in the State of Idaho, as compiled by Idaho Secretary of State Pete T. Cenarrusa, formed the basis of the distribution of funds, designated and undesignated, for the 1976 political campaigns in Idaho. A review of those statistics indicates that the Appellants in Idaho ran only four candidates for 10 major U.S. and Idaho political offices. The percentages of votes cast for American Party candidates in those four races are as follows:

Office	Total Votes Cast	Percentage & Number	
United States Senate	258,857	1.8%	4,635
Governor	259,672	2.6%	6,759
Lt. Governor	254,810	2.4%	6,319
Treasurer	202,443	15.6%	31,570

(*See* Appendix A for Complete Abstract)

In each case Appellants' candidates received vote totals so miniscule as not to have any significant effect on any of the "major party" candidates. Even where the American Party candidate was the sole opposition for the Democratic candidate, Appellants' candidate received only approximately one-seventh of the total vote.

Appellants demand strict scrutiny in reviewing the constitutionality of the law but show no demands made upon themselves to demonstrate a measurable quantity of voter and community support. Comparative voting statistics prove the Act does preserve the integrity of the Idaho electoral process and fairly reflects public sentiment.

Appellants ask for an equal voice in the electoral system but do not produce the popular backing of the citizenry even without the Act. The 1974 Idaho General Election statistics were compiled based upon an election which had no Act assistance. There is no showing that a change of the undesignated fund section will significantly change future election day outcomes.

Appellants say that unless the undesignated fund distribution formula is changed, new or minor parties will be forced to cater to the money influences which the campaign financing act is seeking to play down. The argument rings hollow. At best, the Appellants can get 50% of 90% of undesignated funds. Along with any number of other parties, it can secure an equal share of the remaining 10 per cent.

Appellants should rather want to emphasize public drives or campaigns for designated funds for its party. The bulk of check-offs has gone to designated rather than undesignated funds. (See Appendices B and C)

Appellants have not shown even a modicum of support, a standard which they themselves cite as a basis for distributing funds to aspirant political parties. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Appellants may never succeed in achieving funding parity but the reason is not the Idaho Election Campaign Fund. Act. The reason has as much to do with Appellants' own weak, unorganized political history.

Appellants argue that use of the preceding gubernatorial election results as a basis for undesignated fund distribution promotes obsolete and "all but dead" parties. On the other hand, they argue "legislative enactments which tend to dilute the political strengths of certain elements of the population are constitutionally invalid." It is alright, in other words, to do away with parties which are "behind the times" but not permissible to stifle the slow, growth of the American Party of Idaho. The reasoning is inconsistent.

V

CONCLUSION

Intervenor/Respondent respectfully requests this Court to affirm the judgment of the Three-Judge Federal District Court sitting in the United States District Court for the District of Idaho which granted Summary Judgment in favor of the Defendants and against Plaintiffs. For the reasons advanced in this brief, the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

DATED this 4th day of February, 1977.

Respectfully Submitted,
/s/ PAUL J. BUSER, ESQ.,
of the firm
MARTIN, CHAPMAN, MARTIN
& HYDE, CTD.
Boise, Idaho
Attorneys for Intervenor/
Respondent

Appendices A, B & C Following

ABSTRACT OF VOTES

Cast at the General Election November 5, 1974
STATE OF IDAHO

Issued by Pete T. Cenarrusa, Secretary of State

COUNTIES	U.S. Senate			Representative in Congress				Governor			Lieutenant Governor		
				First District		Second District							
	Smith	Church	Stoddard	Symms	Cox	Hansen	Hanson	Murphy	Andrus	Vetter	Ravenscroft	Evans	Olson
	Rep.	Dem.	Amer.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Amer.	Rep.	Dem.	Amer.
Ada	20,357	26,439	779	21,878	14,092	5,120	5,550	12,321	34,214	1,169	21,541	24,682	1,390
Adams	597	613	21	805	376	—	—	336	878	19	551	583	29
Bannock	5,869	12,111	318	—	—	8,734	9,266	3,443	14,387	491	5,652	12,108	463
Bear Lake	1,150	1,395	49	—	—	1,573	950	887	1,585	135	1,200	1,214	114
Benewah	802	1,511	19	1,365	856	—	—	481	1,909	14	641	1,584	17
Bingham	3,396	5,484	250	—	—	4,880	4,062	2,284	6,480	369	4,292	4,469	331
Blaine	903	1,615	31	—	—	995	1,147	533	1,881	55	1,065	1,287	35
Boise	529	721	15	777	405	—	—	356	902	34	546	628	53
Bonner	2,241	4,350	121	3,350	3,064	—	—	1,636	4,961	163	2,183	4,010	192
Bonneville	7,539	9,215	335	—	—	8,544	8,177	5,122	11,559	428	8,621	7,967	432
Boundary	1,022	1,302	21	1,361	927	—	—	430	1,902	34	678	1,498	37
Butte	473	703	15	—	—	485	630	311	857	19	493	659	1
Camas	175	227	5	—	—	231	149	102	296	10	250	150	4
Canyon	11,614	10,428	263	15,096	7,005	—	—	6,834	15,127	413	11,371	10,282	444
Caribou	1,095	1,205	64	—	—	1,397	838	802	1,470	107	1,154	1,076	95
Cassia	2,893	2,212	229	—	—	3,552	1,688	1,831	3,066	420	3,174	1,787	326
Clark	168	183	8	—	—	205	137	164	199	7	215	131	6
Clearwater	577	2,039	51	1,132	1,493	—	—	294	2,348	43	615	1,966	59
Custer	711	428	22	—	—	575	504	534	576	45	692	391	19
Elmore	1,169	2,311	45	—	—	1,397	1,723	774	2,712	53	1,299	2,066	58
Franklin	1,794	1,441	100	—	—	2,137	1,098	1,059	2,105	173	1,390	1,701	134
Fremont	1,649	1,832	37	—	—	2,030	1,254	1,169	2,283	91	1,825	1,592	77
Gem	1,722	2,046	61	2,274	1,444	—	—	1,139	2,628	69	1,739	1,890	81
Gooding	1,899	1,803	61	—	—	1,912	1,480	1,192	2,461	91	2,169	1,492	56
Idaho	1,970	2,276	56	2,498	1,690	—	—	1,066	3,150	84	1,575	2,512	72
Jefferson	2,359	1,901	103	—	—	2,611	1,394	1,801	2,460	122	2,591	1,586	83
Jerome	2,252	1,693	63	—	—	2,298	1,283	1,237	2,655	135	2,531	1,351	90
Kootenai	4,741	7,952	104	7,042	5,578	—	—	3,272	9,512	112	4,327	7,858	109
Latah	2,157	6,438	121	3,775	4,787	—	—	1,307	7,301	112	2,845	5,548	142
Lemhi	1,150	905	222	—	—	1,311	838	1,148	1,017	111	1,416	701	65
Lewis	439	914	26	658	642	—	—	240	1,147	6	377	954	13
Lincoln	696	628	29	—	—	731	505	492	832	48	860	462	28
Madison	2,178	2,463	103	—	—	3,048	1,620	1,634	2,964	138	2,617	1,964	133
Minidoka	2,280	2,392	144	—	—	2,747	1,983	1,338	3,215	259	2,744	1,833	203
Nez Perce	2,558	6,928	158	4,147	5,331	—	—	1,249	8,280	120	2,634	6,688	188
Oneida	671	734	38	—	—	736	653	440	967	46	399	1,016	37
Owyhee	926	994	21	1,347	537	—	—	695	1,228	27	1,006	838	38
Payette	1,846	2,114	66	2,552	1,333	—	—	1,239	2,759	63	1,890	1,923	90
Power	601	1,271	32	—	—	941	798	404	1,476	44	794	1,064	33
Shoshone	1,534	3,662	47	2,328	2,742	—	—	1,186	4,056	52	1,479	3,501	53
Teton	527	623	17	—	—	734	386	424	722	18	628	490	12
Twin Falls	7,794	6,778	303	—	—	8,350	5,486	4,170	9,898	737	8,939	5,168	404
Valley	772	1,053	23	1,108	637	—	—	463	1,404	19	799	971	36
Washington	1,375	1,807	39	1,911	1,062	—	—	892	2,313	54	1,377	1,666	37
TOTALS	109,072	145,140	4,635	75,404	54,001	67,274	53,599	68,731	184,142	6,759	115,184	133,307	6,319
PLURALITY	36,073			21,413		13,675		115,451			18,123		

ABSTRACT OF VOTES

Cast at the General Election November 5, 1974
STATE OF IDAHO

Sec. of State		Auditor		Treasurer		Attorney General		Superintendent of Public Instruction		CONSTITUTIONAL AMENDMENTS				Initiative No. 1	
										SJR 114		SJR 118			
Cenarrusa	Daniels	Greenberk	Williams	Moon	Hunsaker	Kidwell	Park	Moore	Truby						
Rep.	Dem.	Rep.	Dem.	Dem.	Amer.	Rep.	Dem.	Rep.	Dem.	Yes	No	Yes	No	Yes	No
33,307	13,586	18,711	27,784	38,423	7,876	26,131	21,480	19,947	26,923	23,584	17,162	26,454	14,904	35,184	7,494
777	349	314	803	924	78	668	508	473	590	508	492	602	402	833	284
10,021	7,842	5,442	12,339	14,674	3,145	9,209	8,916	6,091	11,897	10,595	5,515	10,579	5,487	12,558	3,288
1,448	993	960	1,464	1,875	218	1,108	1,296	1,102	1,278	1,010	1,143	1,176	1,007	1,275	1,029
844	1,304	562	1,585	1,828	52	672	1,494	633	1,403	1,385	682	1,508	549	1,838	375
5,915	3,069	3,374	5,593	7,048	1,883	4,838	4,205	4,299	4,711	5,228	2,880	5,462	2,527	6,299	1,835
1,724	628	700	1,502	1,874	102	1,019	1,327	958	1,154	1,407	781	1,519	628	1,986	378
821	360	381	791	944	83	693	532	507	562	609	506	679	431	935	283
3,120	3,103	2,053	4,051	4,982	429	3,059	3,075	2,293	3,758	3,429	2,420	3,780	2,039	4,820	1,418
11,349	5,372	7,648	9,106	13,878	2,780	8,897	8,127	7,726	9,148	9,029	5,766	9,549	5,066	11,895	3,946
933	1,217	669	1,458	1,715	92	831	1,259	719	1,315	1,042	961	1,225	801	1,524	630
720	410	317	802	937	51	552	594	484	609	625	404	649	349	832	281
285	116	151	230	293	21	233	160	182	180	197	156	203	142	295	93
15,497	6,265	8,999	12,398	17,586	3,838	13,086	8,967	10,745	10,831	10,606	7,903	11,856	6,773	14,533	4,590
1,351	887	855	1,362	1,675	209	1,048	1,138	1,462	729	1,079	955	1,250	784	1,356	748
3,896	1,346	2,346	2,840	3,841	1,300	3,440	1,804	3,264	2,002	2,369	2,121	2,636	1,837	3,431	1,350
257	91	158	180	228	24	222	129	188	130	143	165	185	129	228	114
1,148	1,448	489	2,088	2,332	230	715	1,895	652	1,970	1,509	727	1,549	661	1,858	405
750	278	368	654	780	67	692	394	491	532	481	491	602	379	784	290
2,063	1,270	950	2,192	2,747	214	1,538	1,821	1,181	2,003	2,020	1,119	2,096	921	2,655	581
1,780	1,390	1,305	1,874	2,244	372	1,396	1,743	1,723	1,350	1,185	1,499	1,436	1,256	1,673	1,209
2,207	1,189	1,371	2,024	2,598	180	1,934	1,516	1,780	1,478	1,690	1,337	1,702	1,209	2,280	914
2,413	1,209	1,234	2,318	2,818	214	1,987	1,717	1,447	2,114	1,607	1,615	1,865	1,376	2,642	886
2,483	1,006	1,363	2,081	2,714	212	1,863	1,600	1,717	1,637	1,757	1,342	2,022	1,052	2,740	742
2,168	1,789	1,121	2,725	3,385	139	1,813	2,444	1,340	2,578	2,277	1,375	2,469	1,139	3,130	811
2,884	1,218	1,783	2,342	2,906	440	2,471	1,734	2,317	1,650	1,740	2,122	1,987	1,839	2,335	1,629
2,818	1,025	1,552	2,191	2,864	266	2,233	1,628	1,947	1,684	1,974	1,402	2,199	1,175	2,858	909
6,023	5,958	4,143	7,684	9,473	434	6,019	6,156	4,356	6,960	6,879	4,228	7,345	3,469	9,292	2,485
4,774	3,483	2,421	5,629	7,155	983	3,404	4,978	2,862	5,451	5,858	1,751	5,871	1,661	6,799	996
1,524	598	983	1,135	1,489	183	1,284	850	1,243	844	852	1,034	1,027	845	1,266	770
564	711	274	990	1,087	31	399	879	349	860	796	374	786	369	1,008	277
963	342	481	787	993	92	740	581	639	508	637	523	745	438	1,015	286
3,285	1,348	2,175	2,453	3,550	1,023	2,714	1,969	2,747	1,895	2,322	1,757	2,535	1,488	3,174	1,057
3,416	1,329	1,854	2,826	3,732	940	2,543	2,175	2,642	2,087	2,345	1,734	2,635	1,434	3,353	1,050
4,526	4,794	2,202	7,083	7,978	1,154	3,232	6,215	2,758	6,630	6,010	2,144	6,102	1,967	7,004	1,197
623	766	308	1,114	1,082	101	559	799	491	836	604	570	700	472	858	370
1,345	496	641	1,146	1,400	108	1,069	810	691	853	788	817	946	668	1,244	502
2,413	1,349	1,441	2,281	2,821	253	2,191	1,698	1,813	1,811	2,010	1,336	2,271	1,061	2,940	823
1,183	636	567	1,234	1,484	101	946	908	828	892	1,067	605	1,091	559	1,342	407
2,066	2,864	1,286	3,640	4,087	150	1,848	3,162	1,497	3,314	2,906	1,580	3,121	1,368	3,634	1,192
703	377	406	696	832	75	594	517	500	472	503	503	556	437	696	344
10,047	3,834	5,609	7,621	9,720	1,126	7,663	6,288	6,655	6,912	6,376	4,202	6,836	3,837	8,945	2,474
1,203	540	545	1,179	1,496	80	953	846	652	978	968	668	1,093	544	1,398	370
1,952	1,067	969	1,983	2,381	212	1,596	1,492	1,207	1,530	1,386	1,125	1,540	938	2,157	617
159,557	89,252	91,479	154,256	198,873	31,570	130,002	121,906	107,828	137,087	131,180	87,972	139,118	76,405	178,705	51,707
70,305		62,777		167,303		8,096		29,259		43,208		62,713		126,998	

PETER E. HEISER, JR.
Chief Deputy Attorney General
State of Idaho

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1 76 148 AFFIDAVIT OF DENNISON C. AMBROSE

THE AMERICAN PARTY OF IDAHO, JOHN McADAMS, individually and as chairman of THE AMERICAN PARTY of Idaho,

Plaintiffs,

--vs.--

CECIL D. ANDRUS, Chairman of the State Board of Examiners, and the Idaho State Board of Examiners; DENNISON C. AMBROSE, Director of the Corporation Department of the Idaho Department of Revenue and Taxation; JOE R. WILLIAMS, Idaho State Auditor; PETE CENARRUSA, Secretary of the State of Idaho; and MARJORIE MOON, Treasurer of the State of Idaho,

Defendants,

IDAHO STATE DEMOCRATIC PARTY,

Intervenor.

STATE OF IDAHO
County of Ada } ss:

I, Dennison C. Ambrose, being first duly sworn, depose and say that:

I am the duly appointed, acting and qualified Deputy Commissioner of Department of Revenue and Taxation of the State of Idaho, and am in charge of both corporate and individual income tax as part of my duties thereunder;

I am familiar with the number of individual tax-returns which were filed in the State of Idaho in 1976 and am also familiar with the number of individual income tax returns filed in 1976 in which individuals designated that one dollar be paid into the election campaign fund, pursuant to section 63-3088, *Idaho Code*, and, though no figures are yet available for 1975 tax returns, I am also familiar with the ratio of joint returns by husband and wife to the total number of individual tax returns as based on information gathered from the 1974 tax year;

I hereby state and affirm that these aforementioned figures are as follows:

As of July 31, 1976:

$47,362.00 was "checked off" for application to the election campaign fund at a rate of $1.00 per individual who utilized the §63-3088 check off procedure for tax year 1975;

approximately 295,000 Individual Tax Returns (Form 40) were filed for tax year 1975;

based upon 1974 tax year data, about 42% of all Individual Tax Returns would be filed by single persons or married persons filing a separate, rather than

joint, return, amounting to 123,900 single person returns for the 1975 tax year;

based upon 1974 tax year data, about 58% of all Individual Tax Returns would be filed by married persons filing jointly, amounting to 171,100 returns representing 342,200 individual persons for the 1975 tax year;

the approximate total number of individual persons who filed Individual Tax Returns for the 1975 tax year, based upon the above figures, is 466,100 each of whom could have "checked off" a $1.00 amount for the election campaign fund;

based upon the above figures approximately 10.16% (47362/466100) of the individual persons filing Individual Tax Returns for the 1975 tax year chose to participate in the election campaign fund procedure;

I do swear and affirm that the above figures are true and correct to the best of my knowledge;

Further affiant saith not.

DATED this 19 day of August, 1976.

DENNISON C. AMBROSE

SUBSCRIBED AND SWORN TO this 19th day of August, 1976.

NOTARY PUBLIC
Residing at Boise, Idaho
My Commission expires: 3/22/77

PETER E. HEISER, JR.
Chief Deputy Attorney General
State of Idaho

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1 76 148
AFFIDAVIT OF BENITO T. YSURSA, ESQ.

THE AMERICAN PARTY OF IDAHO, JOHN McADAMS, individually and as chairman of THE AMERICAN PARTY of Idaho,

Plaintiffs,

vs.

CECIL D. ANDRUS, Chairman of the State Board of Examiners, and the Idaho State Board of Examiners; DENNISON C. AMBROSE, Director of the Corporation Department of the Idaho Department of Revenue and Taxation; JOE R. WILLIAMS, Idaho State Auditor; PETE CENARRUSA, Secretary of the State of Idaho; and MARJORIE MOON, Treasurer of the State of Idaho,

Defendants,

IDAHO STATE DEMOCRATIC PARTY,

Intervenor.

STATE OF IDAHO
County of Ada } ss.

I, Benito T. Ysursa, Esq., being first duly sworn, depose and state that:

I am the duly appointed, acting, and qualified Deputy Secretary of State of the State of Idaho, and pursuant to my duties in such position am in charge of elections in the State of Idaho;

I am duly licensed as an attorney in the State of Idaho and am admitted to practice before the Supreme Court of the State of Idaho and the United States District Court for the District of Idaho;

I am familiar with the "undesignated" tax monies available for distribution to political parties in the State of Idaho under the formula provided in section 34-2503(b), *Idaho Code*, and do hereby state and affirm that the monies available and the distribution which would be applied under said subsection of the *Idaho Code* are as follows:

Total available: $16,752 x 90% = $15,076.80

To Democratic Party:
50% x $15,076.80 = $7,538.40 + $996.15
= $8,504.55

To Republican Party:
26.46% x $15,076.80 = $3,990.83 + $996.15
= $4,956.98

To American Party:
2.6% x $15,076.80 = $392 + $996.15
= $1,358.15

To Labor Party:
$996.15

To Libertarian Party:
$996.15

(NOTE: $996.15 equals 10% of the "undesignated" monies together with other undistributed monies which, by statute is distributed equally to all political parties in Idaho.)

The above figures and distribution formula are true and correct to the best of my knowledge;

Further affiant saith not.

DATED this 19th day of August, 1976.

BENITO T. YSURSA

SUBSCRIBED AND SWORN TO before me this 19th day of August, 1976.

MIREN E. ARTIACH
Notary Public for Idaho
Residing at Boise, Idaho
My commission expires: 4-15-80

COUNTY OF ADA
STATE OF IDAHO } ss.

AFFIDAVIT
OF SERVICE

Paul J. Buser, of the firm of MARTIN, CHAPMAN, MARTIN & HYDE, CHARTERED, being first duly sworn, deposes and certifies that on this 4th day of February, 1977, three copies of the Motion to Affirm by Intervenor/Respondent were mailed, postage prepaid, to Attorney for the Appellants and Attorneys for the Appellees at the following addresses.

Preston G. Lutz
P.O. Box 8553
Boise, Idaho 83707

Wayne L. Kidwell
Idaho Attorney General
Attention:

Peter E. Heiser, Jr.
Statehouse — Room 225
Boise, Idaho 83720

I further certify that all parties required to be served have been served.

Counsel for Intervenor/Respondent

Subscribed and sworn to before me this 4th day of February, 1977.

Notary Public for Idaho
Residence: Boise, Idaho